

MEMORANDUM

TO: Honorable Holly J. Hughes
RE: Admissibility of Testimony Concerning MESC Proceedings
DATE: September 27, 2011

I. INTRODUCTION:

The Michigan Employment Security Act, set forth at MCL § 421.1 *et seq.*, provides for the “systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.” Section 11 of the act, MCL § 421.11(b)(1) states that information obtained from any individual pursuant to the administration of the Michigan Employment Security Act (the “Act”), and determinations as to the benefit rights of any individual are confidential and shall not be disclosed or open to public inspection other than to public employees and officials in the performance of their official duties under the Act, and to agents or contractors of such public officials. In addition, MCLA § 421.11(b)(1)(iii) states that the information and determinations of the MESC shall not be used in any action or proceeding before any court or administrative tribunal unless the MESC is a party to or a complainant in the action or proceeding, or unless used for the prosecution of fraud, civil proceeding, or other legal proceeding in certain specified programs under the Act.

I. RATIONALE FOR AMENDMENT

In a recent court case in Saginaw County, Plaintiff brought suit against his employer claiming his employer had retaliated against him for filing a workers compensation claim and for age discrimination with regard to his termination. Plaintiff made statements attributable to his employer during the course of the trial that brought

Plaintiff's credibility squarely in front of the jury. In an effort to attack Plaintiff's credibility, the employer sought to introduce evidence that the employee just 18 months earlier had made fraudulent statements to the MESC in order to obtain unemployment benefits. During the course of applying for and/or obtaining such benefits, Plaintiff was found to have defrauded both the MESC and his former employer because Plaintiff *knowingly made false statements to the MESC with intent to defraud*. The employee was required to repay his employer and the MESC for the unemployment benefits wrongfully obtained. *Because of the impediments imposed by Section 11 of the Act, Plaintiff's fraudulent statements were not allowed into evidence to undermine his credibility.*

As currently enacted MCLA § 421.11(b)(1) provides that information obtained from any individual pursuant to the administration of the Michigan Employment Security Act (the "Act"), and determinations as to the benefit rights of any individual are confidential and shall not be disclosed or open to public inspection other than to public employees and officials in the performance of their official duties under the Act, and to agents or contractors of such public officials. In addition, MCLA § 421.11(b)(1)(iii) states that the information and determinations of the MESC shall not be used in any action or proceeding before any court or administrative tribunal unless the MESC is a party to or a complainant in the action or proceeding, or unless used for the prosecution of fraud, civil proceeding, or other legal proceeding in certain specified programs under the Act. As the statute provides the only exception is when the MESC is a party to the action.

In *Paschke v. Retool Industries*, 445 Mich. 502; 519 N.W.2d 441 (1994), the argument was raised that, by a person voluntarily testifying about representations made to the MESC, that person waived any privilege created by the Act. However, the Act, as interpreted by the Supreme Court of Michigan, provides for an absolute privilege concerning information presented to the MESC, unless the MESC is a party to or complainant in the action. *Id.*, see also *Storey v. Meijer, Inc.*, 431 Mich. 376; 429 N.W.2d 169 (1988) and *Wojciechowski v. General Motors Corp.*, 151 Mich.App. 399, 406; 390 N.W.2d 727 (1986). There is no indication that the privilege created by the Act is subject to waiver by the parties. In short the Supreme Court interpreted the Act as written

Without providing an exception involving a civil suit between a recipient of unemployment benefits and his/her employer where evidence of conduct and statements made would otherwise be admissible pursuant to the Michigan Rules of Evidence, a potential plaintiff who knowingly commits fraud upon his/her employer can do so with impunity. The employer could never bring up the employees fraud because of the statute as currently written. There are a myriad of circumstances where such conduct would clearly be relevant in a suit between an employee and his/her employer, but as written the statute would prevent such information from ever being made public even in a court of law.

MEMORANDUM

TO: Honorable John Walsh
CC: Honorable Holly Hughes
RE: House Bill No. 5055
DATE: May 23, 2012

I. ISSUE:

What effect does House Bill No. 5055 have on the existing confidential provisions of Section 11(a) of the Michigan Employment Security Act? The short answer is the bill has no effect other than to waive the privilege in the limited circumstance allowed by HB 5055.

II. ANALYSIS:

The language of House Bill No. 5055 does not require the Unemployment Insurance Agency ("UIA") to disclose confidential information to any third party. The Michigan Employment Security Act currently provides such information to the employer and the employee.

Section 11 (b)(ii) of the Act states:

Any information in the commission's possession that may affect a claim for benefits or a charge to an employer's experience account shall be available to interested parties as defined in R 421.201 of the Michigan administrative code (emphasis added).

Rule 201 of the Michigan administrative code provides that:

(1) The term "interested party," as used in the act or these rules, means anyone whose statutory rights or obligations might be affected by the outcome or disposition of the determination, redetermination, or decision. An interested party has all of the following rights:

(a) The right to receive a copy of the notice of determination or redetermination.

(b) The right to request a reconsideration of the determination or redetermination.

(c) The right to appeal to a referee or the board of review in the manner provided in the act.

(2) The agency is an interested party in any appeal before a referee, the

board of review, or in any judicial action involving an order or decision of the board of review or a referee.

(3) An employer or employing entity in this or another state is an interested party in connection with a claim for benefits if the employer's or employing entity's account has been charged, the employer or employing entity is presently or potentially chargeable with some portion of benefits paid or payable on such claim, or the employer or employing entity is directly involved in a possible ineligibility or disqualification of a claimant.

MI ADC R. 421.201

To the extent an interested party opens the door in a subsequent proceeding to information already disclosed to the employer, or vice versa, the privilege that currently exists preventing such information from being used is deemed waived under HB 5055.

HB 5055 states:

An individual who *testifies voluntarily* before another body concerning representations the individual made to the unemployment agency pursuant to the administration of this act *waives any privilege under section 11 otherwise applying* to the individual's representations to the unemployment agency (emphasis added).

In short House Bill No. 5055 allows either the employee or employer, to use information already disclosed to them in accordance with the Michigan Employment Security Act, in the event either takes a contrary position in a subsequent proceeding where such information might otherwise be relevant. The remaining confidential provisions of the Michigan Employment Security Act would stay intact as HB 5055 does not require the UIA to make any disclosure to third parties.